89-1162

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

NOVEMBER TERM 1989

Mary Ann Crompton, D.B.A.,

Pro-Par Industries, Inc.,

Petitioner

vs.

General Motors Corporation

Respondent

PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS FOR

THE SIXTH CIRCUIT

Mary Ann Crompton, D.B.A.,

Pro-Par Industries Inc.

8989 Dog Leg Road

Dayton, Ohio 45414

513-890-7003

QUESTIONS PRESENTED FOR REVIEW

1. Whether Justice is served for Petitioner to suffer such unnecessary harm that is reflected in this unusual case when there is genuine issues of material fact concerning Respondents Good Faith?

2. Whether the court and not Summary Judgement is appropriate in deciding new law or guidance in this case?

3. Whether Respondents premature Summary Entry lacks validity since it contains false information disputed in light of evidence confirmed from discovery made available to Petitioner after deposing its witnesses and after the filing?

4. Whether the estimated annual volumes is also Respondents stated estimate and has definite legal significance in this case?

5. Whether a Requirements Contract is not a buyers option and the reduction of estimated requirements must not have been motivated solely by a reassessment of advantages and disadvantages of contract is also a genuine issue in this case?

6. Whether the intent and purposes of the contract was legally fulfilled?

7. Whether it was good faith for respondent to even have a 66½% reduction in requirements to petitioner who could only rely on the contract price setting a measurable standard?

PARTIES

Petitioner (Plainfiff/Appellant in the
United States Court of Appeals
for the Sixth Circuit
Mary Ann Crompton, D.B.A.
Pro-Par Industries, Inc.

Respondents (Defendants/Appellees in the
United States Court of Appeals
for the Sixth Circuit
General Motors Corp.

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IN THE

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Pro-Par Industries, Inc.

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Respondent

PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner Mary Ann Crompton, D.B.A., Pro-Par Industries, Inc., respectfully prays that a writ of certiorari issue to review the judgment of the Sixth Appellate District of Ohio.

OPINIONS BELOW

The opinion of the Sixth Appellate District of Ohio is unreported and appears in the Appendix hereto, page 2 a.

JURISDICTION

The decision of the United States Court of Appeals for the Southern District of Ohio, Western Div. Summary Judgment ruling was entered August 3, 1989.

STATEMENT OF THE CASE

A. Statement Of The Facts

Petitioner (Pro-Par) and Respondent (G.M.) entered into three contracts whereby Pro-Par was to furnish to G.M. ten different manufactured car parts for a one year period. To facilitate the contracts Pro-Par invested in additional machinery, tooling and employees. Pro-Par stood by ready to furnish these parts as G.M. requested pursuant to written releases issued by G.M. One Pro-Par machine operator was responsible for (3) machines. If there were reduced releases, machine time would be reduced accordingly to 1/3 or 2/3 as determined. In this case G.M.'s reduced administered requirements shut down their booked machine time 66½% at Pro-Par's expense. Had we been notified of lesser requirements we could have booked other business.

Before entering into these contracts G.M. issued to Pro-Par and other suppliers Requests For Quotations (RFQ) to obtain competitive bids for piece prices. These (RFQ) provided Estimated Annual Volumes (EAV) for the one year period for each part. In submitting its bids Pro-Par relied upon G.M.'s (EAV) for amortizing fixed costs in developing its bid. In signing the contracts Pro-Par either agreed to furnish 100% or lesser percentages on the ten parts, but believed that the (EAV) was a term of the contract. In fact it was constituted in the contract price itself. Copy Lease Corp. of America v. Memorex Corp. 397 F.Supp 853(SDNY) "A contract specifying a quantity during its initial term was not a Requirements Contract but was one for a minimum stated amount. Pro-Par maintains that the (EAV) was also G.M.'s stated

estimate setting a measurable standard, and was the inducement and consideration to accept and perform until the contract was completed or cancelled and settled up. G.M. booked Pro-Par's machining capacity for their single market car items based on their stated estimates.

> UCC 2-306 comment (3) "The agreed estimate is to be regarded as a center around which the parties intend the variation to occur." This comment appears to give an interpretation addressing the elasticity that could be expected.

B. History of Proceedings

The action was filed in the District Court below pursuant to a Petition for Removal on December 11, 1984. Pro-Par brought suit against G.M. on November 6, 1984 in the Montgomery County, Ohio Common Pleas Court on the basis of breach of contract and promissory estoppel.

On September 8, 1986,G.M. filed its Motion for Summary Judgment contending that it had not breached its Requirements Contracts with Pro-Par. Memoranda were filed in opposition to and in further support of the Motion and on August 3, 1987, the Trial Court issued its Decision and Entry sustaining in part and overruling in part G.M.'s Motion for Partial Summary Judgment.

On June 13, 1988, the Court entered an Entry Granting partial Summary Judgment to

General Motors Corp.

On July 12, 1988 Pro-Par filed its Notice of Appeal.

REASONS FOR GRANTING THE WRIT

I. DEFINING THE LIMITS OF SUMMARY JUDGMENT

For the Ohio Courts to allow Good Faith Reductions in Estimated Annual Volumes appears to be a case of first impression. If that is to be the status of Ohio Law, Summary Judgment would not be appropriate to make new law. Pro-Par's federal right may have been violated in this case from the conclusion of law by such method. Also Petitioner submits there is compelling evidence to support the allegations that Respondents conduct demonstrated Bad Faith in its dealing with Pro-Par.

II. CONTRACTS INTENT AND PURPOSE NOT FULFILLED

Respondent (G.M.) needed booked manufacturing capacity to administer their released requirements for their car parts.

Petitioners (Pro-Par) business need was to sell and book its manufacturing capacity for its income, This represents the Good Faith intent and purpose of the business dealings between the parties. G.M."s Estimated Annual Volume (EAV) was provided on their Request For Quotation (RFQ) to prepare a piece price. Their EAV there-fore is also their stated estimate. In entering the contract for a (1) year booking G.M. in their writing used Pro-Par's quoted piece price which Pro-Par relied on. Pro-Par prepared, structured, and amortized its costs accordingly. Pro-Par felt secure with G.M.'s contract because the contract price itself constituted a set measurable standard, and meant no illusory condition existed. Pro Par emphatically argues that no illusory condition existed in the beginning and

none should exist now. Pro-Par maintains the Ohio Courts are in error in ruling an illusory condition may exist because G.M. had a bad year. Propane Industrial Inc. vs. General Motors Corp. 429F.Supp 214 (DC Missouri 1977)

III. REJECT ISSUE

G.M. claims they covered for rejects. Pro-Par states that in manufacturing there is tool wear and human error. It is normal to have a reasonable % get past a lot inspection. It is also reasonable to expect a higher % of rejects on some tougher parts, especially in the developing and improving phase. Rejects are fixed on the machine set-up itself. The machine continues with its run, not being shut down in favor of another supplier. Both customer and supplier need to work together on such situations. Pro-Par's inspection and Q.C. assurance was

strictly adhered to, and all shipments were inspected. G.M.'s Inspection handled many parts and could easily get suppliers mixed up, and being human make mistakes as evidenced in discovery items A00074 & A00148. Petitioner sees no justification for G.M. to have covered for rejects.

IV COVER ISSUE

Pro-Par agrees G.M. would have the absolute right to cover for increased needs above their stated estimates. However to cover for rejects of non existent increased needs is wrong. For G.M. to shut down their original booking's should definitely be at their costs. G.M. did shut down Pro-Par and their booking's and brought in new suppliers without notice. In Judge Rice's telephone conference call on June 24, 1987, this could be bad faith. Page 184

V. PROFITABILITY ISSUE

G.M. says Pro-Par was not profitable, they used tax returns that reflected depreciation plus their vertical restraint on Pro-Par to conclude their finding. We see no merit to such a finding and refer to comparables and accepted industry averages. Pro-Par was a up-coming company, and had it not contracted with G.M., would not have used up its working capitol to cover the outrageous 66½% vertical restraint on its trade. Pro-Par was able to obtain new sales but simply could not achieve the sales level needed to overcome its losses. and filed C-11.

VI. BAD FAITH ISSUES

Petitioner Maintains Genuine Issues of Material Fact Exists

1. The shutting down of Pro-Par without notice to cover for increased amounts that did not exist.

2. The shutting down of Pro-Par without notice to cover for rejects instead of increased needs.

3. The accepting of 3,045,735 non-released parts from Alcoa that delayed releases and shut down Pro-Par.

4. The having of "0" requirements after preparation and sample approval and not telling us.

5. On the 116 part G.M. purchased 100,000 pieces from Amco at a reduced price. This shut down Pro-Par. This fact was not disclosed in their Summary Filing. In Judge Rice's own words this act would be bad faith, per his telephone conference call June 24, 1987,Page 184.

6. On the 126 part Pro-Par's price to G.M. was based on 1,096,000 pieces. They purchased on 49,860 pieces. Elrob then became the 126 part supplier to G.M. and

placed their order with Pro-Par for 750,000 pieces at a higher price, which was proportionate to their actual purchase. G.M. however was disproportionate because of their lower amount purchased and inflated basis. G.M.'s basis of 1,096,000 was obviously inflated indicating a lo-balling scheme and treating Pro-Par differently that Elrob. Empire Gas Corp. vs. American Bakeries Co. 840 F2d 1333 (1988). Petitioner maintains the foregoing evidences a situation where G.M. was motivated by a reassessment of advantages and disadvantages of the contract using an inflated basis for price, and shutting down Pro-Par at will without notice. Pro-Par was treated differently than other suppliers.

CONCLUSION

Due to the unusualness of this case new law or guidance is needed and upon the foregoing, a writ of certiorari should issue

to review the judgment of the Sixth Appellate District of Ohio

Respectfully submitted

Mary Ann Crompton, D.B.A.
Pro-Par Industries Inc.
8989 Dog Leg Road
Dayton, Ohio 45414
513-890-7003

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

Case No. 88-3633/88-3695

PRO-PAR INDUSTRIES, INC.

Plaintiff, Appellant,

v.

GENERAL MOTORS CORPORATION,

Defendant, Appellees

BEFORE: KENNEDY and KRUPANSKY, Circuit Judges;and MILES, Senior District Judge

Date of Judgment Entry on Appeal: August 30, 1989

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PER CURIAM Plaintiff-appellant Pro-Par Ind. Inc. (Pro-Par) has appealed from the decision of the district court granting partial summary judgment in favor of defendant-appellee Delco Div of General Motors Corp. (GM) in this diversity action for breach of contract wherein the trial court determined that there was no genuine issue of material fact to support appellants allegations that GM had agreed to purchase any fixed amount or specified percentage of its

1981 estimated requirements for parts numbered 892 and 126 in GM's invitation to bid to Pro-Par.

A review of Pro-Par's assignments of error, the record on appeal, the briefs of the parties, and the arguments of counsel demonstrates that the district court properly granted appellee's motion for summary judgment. See Ohio Rev. Code 1302.19(A) (U.C.C.2-306(1):Empire Gas Corp. v.American Bakeries Co., 840 F2d 1333, 1337-38(7th Cir.1988);R.A.Weaver & Assoc. v.Asphalt Constr., Inc., 587 F2d 1315,1322 (D.C.Cir.1978).

Accordingly, this court affirms the decision of the trial court for the reasons stated by Judge Rice in his decision and entry of August 3, 1987.

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF OHIO

WESTERN DIVISION

PRO-PAR INDUSTRIES, INC.,

Plaintiff,

vs.

GENERAL MOTORS CORPORATION,

Defendant.

DECISION AND ENTRY SUSTAINING IN PART AND OVERRULING IN PART THE DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT(DOC.#24)

This case is before the Court on the Defendant's Motion for Partial Summary Judgment (Doc.#24). For the reasons that follow, the Defendant's Motion is sustained in large part, and overruled in small part.

CONCLUSION

In sum, the Defendant's Motion for Summary Judgment is sustained with respect to parts 892, 190, 116 and 126 and overruled as to part 923. Accordingly, the

Plaintiff's claims with respect to the remaining six parts (parts 923 and five other parts removed or withdrawn by GM from its Motion for Summary Judgment) remain for trial. The Defendant's motions with respect to lost profits for the years 1982 through 1985 and regarding the recovery of punitive damages and attorney fees are sustained.

For the convenience of counsel, the Court is attaching to this Decision and Entry a partial transcript of the telephone conference between Court and counsel during which the Court orally advised counsel as to the decision set forth herein.

WALTER H. RICE

UNITED STATES DISTRICT JUDGE